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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 578

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Respondent's Counsel

December, 1944.

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BRIEF FOR RESPONDENT

The question presented and the statement appearing in the brief for the petitioner are correct and are here adopted. The transfer was not made in contemplation of death (R. 25). The transfer was not taxable by reason of decedent's reservation of income during his life, since the transfer was made prior to March 3rd, 1931. *Hassett* v. *Welch*, 303 U. S. 303.

SUMMARY OF ARGUMENT

Decedent's only interest at the time of his death in the portion of the trust representing the excess over the widow's fund (which was conceded to be taxable) was a contingent right to receive such excess if he survived his two nieces

who constituted the measuring lives of the trust. This interest, found to have an actuarial value of $891.18, was discarded by the Circuit Court as the true measure of decedent's interest and instead the court fixed upon the value found by the Tax Court of $24,930.76 as the true ~~revenue~~ measure of the tax. This sum represented the value of decedent's right to receive the corpus after allowance for the life expectancies of the measuring lives. The statute involved is an estate tax and not a succession tax, and only the interest of the decedent in the trust property was properly taxable. Since under New York law the brother and sister had vested remainders, the only interest or right which passed or was transferred or terminated as a result of decedent's death and which resided in decedent at his death, was the possibility of reverter or reversionary interest which at the maximum could not exceed the value of $24,930.76 as found by the Tax Court. Only this amount was theretofore includible in the gross estate.

THE NATURE OF THE TAX INVOLVED AND THE INTEREST SUBJECT TO THE EXCISE

During the lifetime of decedent's two nieces (their lives constituted the measure of the trust) no act of decedent could alter the operation of the trust instrument or affect the devolution of the property involved, and the trust instrument, not the death of the donor, was the generating source of the transfer. The property passed from the trustee which had the legal title (R. 4), not from decedent.

cf. *May* v. *Heiner*, 281 U. S. 238;
Reinecke v. *Northern Trust Company*, 278 U. S. 339.

If Paul's statement of the principle is to be fully accepted, to wit, "that under an estate tax something must be transferred, or passed, or terminated at death, to serve as justification for the excise tax taken from the estate" (Paul, *Federal Estate and Gift Taxation*, Section 7.04, p. 293), the Commissioner finds himself in somewhat of a dilemma to justify inclusion of the whole of the corpus in the gross estate. Legal title to the corpus passed, the fund passed out of the decedent's possession and control, and the interests of the beneficiaries became fixed, all in 1922, when the trust was created. Under the applicable* New York rules for the construction of the instrument: (*Farmers Loan & Trust Company* v. *Callan*, 246 N. Y. 481, 487-90; *Matter of Fordham*, 235 N. Y. 384, 387-9; *U. S. Trust Co.* v. *Hogencamp*, 191 N. Y. 281, 284-5; *Roosa* v. *Harrington*, 171 N. Y. 341, 348; *Williams* v. *Jones*, 166 N. Y. 522, 532-3; *Matter of Blumenthal*, 124 Misc. 850, 853) there was vested by the trust instrument in the donor's brother and sister absolute title to the remainders after the donor's lifetime subject only to such remainders being divested by their own death or by the birth and survival of issue of the donor or the termination of the trust by the deaths, prior to the donor's, of the donor-decedent's two nieces.

> *New York Real Property Law*, Sections 40, 51, Appendices A & B.

Subject to the possibilities mentioned, therefore, the transfer was "complete" (cf. dissenting opinion of Chief Justice Stone, *Helvering* v. *St. Louis Union Trust Company*, 296 U. S. 39, 46; *Reinecke* v. *Northern Trust Com-*

Helvering v. *Stuart*, 317 U. S. 154.

pany, 278 U. S. 339, 345; *Klein* v. *United States,* 283 U. S. 231).

What the donor retained in the case at bar was a reversion (sometimes called a possibility of reverter) in the event that he survived the measuring lives. It is this reversion and it alone which constitutes the property to which the "string" was attached. The respondent contended below that this possibility of reverter should be included in the gross estate at its actuarial value to the decedent at the time of his death. This contingent interest or possibility of decedent's acquiring the reversion was valued and found by the Tax Court to be $891.18 (R. 17), the corpus of the fund involved being $157,452.82 (R. 17). It was argued by the Commissioner below that this valuation, representing as it does merely the possibility of decedent's survival of the measuring lives, was a valuation of the "string" merely and not of the "package". The Circuit Court proceeded to fix the value of the "package" at $24,930.76, the value of a remainder absolute in $157,452.82 after excision of the expectancy of the two measuring lives.

The death of the decedent during the lifetime of his nieces extinguished only the possibility of decedent's acquiring the reversion. The transfer itself was irrevocable, and decedent under no circumstances could change the ultimate disposition of the property. His death was not the "generating source" of any transfer although his death can be properly said to have accelerated the time of enjoyment of the property by the beneficiaries. The decedent's death served merely to extinguish a property right which the decedent had retained which was actually worth $891.18 to him and which under no circumstances could be worth more than $24,930.76 (R. 17) to anyone discounting all contingencies.

Perhaps a clearer view of the precise factual situation can be obtained if for the moment we consider that decedent instead of reserving a life estate to himself gave the use of the property transferred to third persons during the lives of his nieces and retained the reversion to himself in the event that he survived the measuring lives of the trust. In that event there would be no doubt, and petitioner appears to concede (Respondent's Brief, No. 263, page 7), that the value includible in the gross estate would be the value of the assets transferred less the life interests measured by the lives of the two nieces. This is the actual reversion found by the Tax Court to be of the value of $24,930.76 and is the maximum interest passing at death which might be here properly taxed.

The Commissioner's argument in *Fidelity-Philadelphia Trust Co.* v. *Rothensies* (No. 263 this Term, page 9) wholly ignores the nature of the Federal Estate Tax Law as an estate tax and not a succession tax (*N. Y. Trust Company* v. *Eisner*, 256 U. S. 345; *Y. M. C. A., et al.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 63-3; *Nichols* v. *Coolidge*, 274 U. S. 531, 541) and as a tax related primarily to property owned by the decedent at the time of his death (Paul, *Federal Estate & Gift Taxation*, Volume 1, 4.04 p. 184-5, 7.04 p. 293); nor we submit is it a "transaction" tax. Moreover the tax by the mandate of the statute is expressly limited to a levy upon the value at the time of death of all property *"to the extent of any interest therein* of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after death." The statute does not attach the tax to *transfers intended to take effect at or after death*

but only to "transfers to take effect in possession or enjoyment at or after death" (c.f. Harsch & Kaminoff, "Transfers Intended To Take Effect In Possession Or Enjoyment At Or After Transferor's Death Under The Federal Estate Tax", 15 Washington Law Review and State Bar Journal, 19). (Italics ours.) Nor is there encompassed in the tax "all property * * * of which the decedent had at any time during life made a transfer."

It was not decedent's death which vested the remainder in possession—it was the absence of issue of deceased which accelerated possession of the remainders instead of postponing possession until the death of the issue (cf. *Estate of Horatio Gates Lloyd* v. *Commissioner*, (C. C. A. 3rd) 141 F. 2d. 758).

Except for the possibility of reverter, decedent for the period of the lives of his two nieces gave away all that he had possessed or owned in the property transferred by irrevocable trust. What he so gave absolutely during his life could not be taxed to him at death. (*May* v. *Heiner, supra; Reinecke* v. *Northern Trust Co., supra; Shukert* v. *Allen*, 273 U. S. 545; *Helvering* v. *Proctor*, 140 F. 2d 87; *U. S.* v. *Brown*, 134 F. 2d 372; *Commissioner* v. *Kellogg*, 119 F. 2d 54. Since, as stated, the statute involved is an estate tax which taxes only property transferred at death by a decedent and does not tax the succession when received, only that which passed from the decedent at his death and which had not been transferred during life, to wit: the reversion or possibility of reverter having a maximum value of $24,930.76, could properly be the subject of tax. This value was all that the decedent owned in the property transferred during life which might be subjected to estate tax. What the remaindermen received was partly an inter-

est conveyed during life (to the extent of the value of the estate measured by the lives of the nieces) and partly an interest "transferred" at death by the "termination" of the possibility of reverter (which reverter could only have occurred upon the death of the survivor of the nieces, both of whom are still alive).

There is not present in this trust made in 1922, "the thought of avoiding taxes". (*Shukert* v. *Allen, supra*), "the transfer was not inchoate and imperfect", (*Burnett* v. *Guggenheim,* 288 U. S. 280, 284), the transfer was "complete" when made (*Reinecke* v. *Northern Trust Company, supra*), the donor no longer had "dominion", (*Corliss* v. *Bowers,* 281 U. S. 376, 378), and only the termination of the lives of decedent's two nieces, events over which decedent had no control, would have reinvested him with the property.

A complete change of "economic benefits" over the corpus of the trust together with the transfer of title and possession in the trustee for the beneficiaries took place in 1922 (cf. *Burnett* v. *Guggenheim, supra*), and the property so far as concerned the decedent-donor's right to deal therewith was placed beyond "recall". (*Burnett* v. *Guggenheim, supra,* page 288; *Shukert* v. *Allen, supra,* p. 547.) Decedent's death did not effect the final distribution of the remainder interest which was fixed by the trust instrument, nor were the identity of the distributees nor the quantum of the final gifts affected by decedent's death (cf. Estate of Margaret Durbin Sibley, Tax Court October 28, 1944, Prentice-Hall par. 64718, TC Memo Service Prentice-Hall, 44347). That decedent retained a life estate in the property is of no moment, for the enjoyment of some fruits of ownership is not incompatible with ownership of the property in others. *U. S.* v. *Union Trust Co.,* 90 F. 2d 702; *Smith* v. *Commissioner,* 59 F. 2d 533; *Bingham* v. *White,* 31 F. 2d 754.

While this court made plain (*Helvering* v. *Hallock*, 309 U. S. 106) that no niceties of conveyancing would be operative or effective to avoid the estate tax where control of the corpus of an inter vivos trust was retained in the decedent and the shift in economic benefits took place as a result of death, we do not take this to mean that the court contemplated or intended the inclusion in the gross estate of property interests in or over which the decedent had no title or estate or ownership or control (cf. *May* v. *Heiner*, *supra*), nor do we admit that the rule of the *Hallock* case is applicable to support the proposition that a greater valuation as upon a greater estate could or would be found than the actual estate and interest inhering in the decedent at his death.

THE MEASURE OF THE TAX ON DECEDENT'S INTEREST

As indicated above, decedent's brother and sister immediately upon the execution of the trust instrument had vested remainders subject to be divested. While "the law of vested and contingent remainders is full of casuistries" (*Helvering* v. *Hallock*, *supra*, p. 117), this court in *Klein* v. *U. S.*, *supra* (which was specifically reaffirmed in the *Hallock* case) recognized the distinction between vested and contingent remainders (*cf. Reinecke* v. *Northern Trust Company*, *supra*, p. 345, cases cited footnote 4, p. 117, *Helvering* v. *Hallock*, *supra*). Indeed, the court in determining the interest subject to tax is bound to take into account the extent of decedent's interest under the applicable New York law (*Helvering* v. *Stuart*, *supra*).

Quaere, having regard to the fact that the tax is not a succession tax, whether a levy upon the whole of the

corpus of the estate, remainder interests in which were vested in the brother and sister of the decedent, would not be in conflict with the Fifth Amendment, since the burden of the tax falls upon their property (*cf. Heiner* v. *Donnan,* 285 U. S. 312, 327; *Hassett* v. *Welch,* 303 U. S. 303; *Mackey* v. *Commissioner of Internal Revenue,* 94 F. 558; *Pierce* v. *Clauson,* 21 F. Supp. 259). The remaindermen took their interests from the trustee not from decedent's estate. The only benefits the remaindermen might be held to have "received" or which was "transferred" from the decedent's estate was the value of the possibility of reverter which terminated at decedent's death. (*Cf.* Surrey & Aronson, *Inter Vivos Transfers and the Federal Estate Tax,* 32 Columbia Law Review, 1332-1353.) In the *Reinecke* case, *supra,* the court said, page 347 of the Revenue Act under consideration:

> "In its plan and scope the tax is imposed on transfers at death or made in contemplation of death and *is measured by the value at death of the interest which is transferred.*" (Italics ours.)

The Court of Claims in *Central National Bank of Cleveland* v. *United States,* 41 F. Supp. 239, 248 said:

> "The Act therefore expressly says that there should be included in the gross estate only *that interest* which was intended to take effect in possession or enjoyment at or after death. It must follow therefrom that the interest in the property which had already vested in the beneficiaries and which was not transmitted by death is to be excluded from the gross estate."

In *Bryant* v. *Helvering,* 309 U. S. 106, this court did not reject the contention that only the vested reversionary

interest was properly the subject of tax, and in *Klein* v. *U. S., supra,* this court affirmed a judgment which included only the value of the remainder interest which constituted the decedent's possibility of reverter after deducting the value of the interests fully transferred during life (*cf.* Everett, *"Valuation of a 'Possibility of Reverter' Under the Hallock Case"*, 18 Taxes, 611, 612, 613).

In *Commissioner* v. *Flanders* (111 F. 2d 117) and in *Bankers Trust Company* v. *Higgins* (136 F. 2d 477), the possibility of reverter was held a taxable interest in the one case and the extent of the increase of benefit to the remainders by the release of a burden in the other case, was held to be the measure of the value of the interest passing as a result of the decedent's death. To similar effect, *Commissioner* v. *Schwarz,* 74 F. 2d 712.

Attention is respectfully directed to the language of the learned Chief Justice in the dissenting opinion in *Helvering* v. *St. Louis Trust Company,* 296 U. S. 39, where it was said, page 46:

> "Decedent in making disposition of his property by trust deed, retained a valuable interest in the property by which he postponed a final disposition of it until his death. I think the *value of that interest* was rightly subjected to the tax imposed by Section 302(c)."

and later, p. 47:

> "However we label the device, it is but a means by which the gift is rendered incomplete until the donor's death. *The extent to which it is incomplete marks the extent of the 'interest' passing at death, which the statute taxes."* (Italics ours.)

In *Lloyds Estate* v. *Commissioner of Internal Revenue, supra,* the court tested the taxability of an *inter*

vivos transfer by the ability of the transferor to reclaim his property and by the existence of a reserved interest which passed to others on his death. The court there held that the possibility of reverter in the settlor was so remote that it did not constitute a "transfer intended to take effect in possession or enjoyment at or after death". The court did not, because not called upon by the case, determine what if any value should be assessed upon the contingent reversionary interest which terminated by decedent's death (p. 763).

In our brief upon the application for the writ of certiorari we discussed the inapplicability for the reasons there appearing, of *Fidelity-Philadelphia Trust Company* v. *Rothensies*, 142 F. 2d 138 and *Schultz* v. *U. S.*, 140 F. 2d 945.

CONCLUSION

The Commissioner in effect seeks a construction of the statute which does not limit the tax to "the interest of the decedent." He seeks to include any property which vests in possession or enjoyment upon the death of the decedent in which the decedent at any time had an interest, however thin the string over any portion of the property. As we have demonstrated above such is not the true nature or effect of the statute, only the interest of the decedent in the transferred property being subject to the excise.

The interest of the decedent is determined by the *inter vivos* instrument. Decedent had no power of recall over the property and left himself no power to resume ownership or possession except upon a contingency in the nature of a condition subsequent, the occurrence of which was entirely fortuitous so far as any control, design or volition

on his part was concerned. After the execution of the trust, apart from his life estate, he had only a possibility of reverter over a value of $24,930.76 which alone constituted the interest which terminated at death and which would thus be taxable.

Respectfully submitted,

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December, 1944.

APPENDIX "A"

Section 40. When future estates are vested; when contingent.

A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain.

APPENDIX "B"

Section 51. Future estates in the alternative.

Two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.